RAGU SUBRAMANIAM

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI, MALAYSIA & ORS

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN NAIR J
[CRIMINAL APPLICATION NO: MT(3)44-3-2006]
16 MAY 2006

PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Whether procedural requirements of r. 3(2) and (3) Public Order and Prevention of Crime (Procedure) Rules 1972 breached - Whether there was non-compliance of a mandatory provision of procedure - Whether issue of writ of habeas corpus warranted*

The applicant, who was ordered to be detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 for a period of two years, contended that his detention was unlawful and applied for a writ of *habeas corpus* for his release from the said detention. The applicant submitted that there had been a breach of the procedural requirements of r. 3(2) and (3) of the Public Order and Prevention of Crime (Procedure) Rules 1972 ('Rules'). The applicant had indicated in the form containing the notice of intention to appeal to the Advisory Board (under r. 3(2) of the Rules) *ie*, in Form 1 that he intended to engage an advocate to represent him at the appeal. He was given three copies of the said form and he returned two copies of the form duly completed to the Officer of the detention centre, who then posted the two copies to the Advisory Board. The applicant alleged that under r. 3(3) of the Rules, he was only to complete and return one copy of Form 1 to enable the Officer to forward the same to the Secretary of the Advisory Board and that, therefore, when the Officer accepted two copies of Form 1 from the applicant, r. 3(3) of the Rules was breached as only one copy ought to have been taken, leaving two copies with the applicant since he was seeking to be represented by an advocate.

Held (dismissing the application):

(1) The respondents had not breached any mandatory requirement of r. 3(2) or (3) of the Rules by accepting two completed copies of the Form 1 from the detenue, and forwarding the same to the Secretary of the Advisory Board. Rule 3(3) of the Rules has two main parts to it; the first part is the completion of one copy of the Form 1 by the detenue in time and the second is the duty of the Officer in Charge to forward the form to the Secretary of the Advisory Board not more than 14 days after the arrival of the detained person at the place of detention. In the present case, if the Officer in Charge did not forward at least one copy of the form, then it would amount to a non-compliance of a mandatory provision of the procedure. However, when the Officer in Charge sent two forms upon being given the same by the detenue, he was not breaching any provision of r. 3(2) or (3) of the Rules. The applicant was still left with one copy of the Form 1 with him and was not prejudiced, and the issue of a writ of *habeas corpus* was not warranted in the circumstances. (para 7)

Case(s) referred to:

Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649 HC ***(refd)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)

Public Order and Prevention of Crime (Procedure) Rules 1972, r. 3(2), (3)

For the applicant - M/s RR Mahendran & Co

For the respondents - Tengku Amir Zaki Tengku Abdul Rahman DPP (Mohd Asnawi & Cik Aisah DPPs with him)

Reported by Suresh Nathan

JUDGMENT

KP Gengadharan Nair J:

[1] The applicant was ordered to be detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 for a period of two years w.e.f 25 September 2004 at Pusat

Pemulihan Akhlak, Simpang Rengam, Johor. Contending that his detention was not proper and unlawful an application was made for a writ of *habeas corpus* for his release from the said detention.

[2] Although several grounds for the application were stated in the application the applicant's counsel only raised and relied on one issue at the hearing ie, that there had been a breach of the procedural requirements of r. 3(2) and 3(3) of the Public Order and Prevention of Crime (Procedure) Rules 1972 (the Rules). Rule 3 of the Rules which contains the procedure for making representations states as follows:

> 3(1) I shall be the duty of the Officer in Charge, when informing any detained person of his right to make representations, to provide him with two copies (or, if the detained person states that he intends to engage an advocate to represent him, three copies) of Form I in the Schedule.
>
> 3(7) If any detained person refuses to accept service of any document to be served on him under the Ordinance or these Rules or declines to confirm in writing that he does not wish to make any representations against his order of detention the Officer in Charge shall inform the Secretary accordingly.

[3] The applicant had indicated in the form containing the notice of intention to appeal to the advisory board (under r. 3(2)) ie, in Form 1 that he intended to engage an advocate to represent him at the appeal. He was given 3 (three) copies of the said form. He then returned 2 (two) copies of the form duly completed to the officer of the detention centre who then posted the 2 (two) copies to the advisory board.

[4] It was submitted by learned counsel for the applicant that under r. 3(3) of the Rules the applicant was only to complete and return one copy of Form 1 to enable the officer to forward the same to the Secretary of the advisory board and that, therefore, when the officer accepted the 2 (two) copies of Form 1 from the applicant r. 3(3) was breached as only one copy ought to have been taken leaving 2 (two) copies with the applicant as he was seeking to be represented by an advocate.

[5] The Senior Federal Counsel on behalf of the respondents argued that the applicant was in fact given 3 (three) copies of Form 1 and thus there was no breach of r. 3(2). He further submitted that r. 3(3) required only one copy to be forwarded to the advisory board by the officer and that the said rule did not

A specify the number of copies to be retained by the applicant. Refering to the case of *Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 2 CLJ 1199; ([1991] 3 CLJ (Rep) 649) it was argued that the acceptance and sending of 2 (two) copies of Form 1 by the officer was only a breach of
B a directory provision if any, and not a breach of any mandatory provision of the Rules.

[6] Referring to r. 3 Edgar Joseph Jr. J (as he then was) in *Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia* at p 1201 (p 653) referred to other decisions and stated
C as follows:

> Accordingly, in my approach to the question whether the requirements of r. 3 are mandatory or directory I must ask myself the further question whether the requirements are vital and
D go to the root of the matter in which case they would be mandatory and therefore a breach thereof cannot be condoned for, as H.S. Ong FJ said *Re Tan Boon Liat* [1977] 2 MLJ 108 at 116:
>
> > there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are
> E incurably illegal as being in contravention of strictly imperative provisions.
>
> If the requirements of r. 3 are not mandatory, they would be directory only and a breach thereof could be condoned provided
> F there is substantial compliance with the requirements read as a whole and provided no prejudice ensues.
>
> I derive support for the approach I propose adopting from the Indian Supreme Court decision in *Pratap Singh v. Sri Krishan* AIR [1956] SC 140 where the appellant was a candidate for the office
> G of President of a Municiple Committee. The nominations were made on forms which were old forms requiring the caste of the candidate to be seated, whereas the changed rule required the occupation of the candidate to be seated. All candidates filed their nominations in the old forms, but the respondent who knew the change in the law, struck out the word 'caste' put in 'occupation'
> H and gave his occupation. The appellant having been elected, the respondent challenged the election and the High Court, on appeal, set aside the election. Allowing the appeal, the Supreme Court held:

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> We do not think that any failure to comply with any of the provisions set out in the various rules is fatal, and we deprecate this tendency towards technically; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues; and when the legislature does not itself state which is which Judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along abroad based common sense lines.

Similarly, in the Privy Council case of *Punjab Co-operative Bank Ltd, Amritsar v. CIT Lahore* AIR [1940] PC 230, Viscount Maugham referred to the same principle in these terms:

> It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

So, also, in *Liverpool Borough Bank v. Turner* [1861] 30 LJ Ch 379, Lord Campbell said:

> No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with the implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope op the statute to be construed.

[7] In this case I hold that the respondents had not breached any mandatory requirement of r. 3(2) or r. 3(3) of the Rules by accepting 2 (two) completed copies of the Form 1 from the detenue and forwarding same to the secretary of the advisory board. Rule 3(3) has two main parts to it. The first part is the completion of one copy of the Form 1 by the detenue in time and the other is the duty of the officer in charge to forward the form to the secretary of the advisory board not more than fourteen days after the arrival of the detained person at the place of detention. In the present case if the officer in charge did not forward at least one copy of the form then it will amount to a non-compliance of a mandatory provision of the procedure. However when the officer in charge sent 2 (two) forms upon

being given same by the detenue he was not breaching any provisions of r. 3(2) or r. 3(3) of the rules. The applicant was still left with one copy of the Form 1 with him and was not prejudiced and did not warrant the issue of a writ of *habeas corpus* in the circumstances.

[8] Consequently, I dismissed the application (encl. 3).